STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM S. MILLER III

A Member of the State Bar

[No. 87-O-17413]

Filed July 24, 1990

SUMMARY

Respondent was found culpable of failing to perform legal services and of withdrawal from employment without taking reasonable steps to protect his client from foreseeable prejudice. Respondent failed to file an action on behalf of a personal injury client, resulting in the expiration of the statute of limitations. Respondent also misrepresented the status of the matter to the client's husband on at least four occasions, and failed to communicate with the clients. The hearing referee recommended disbarment. (Dennis M. Hart, Hearing Referee.)

Upon its independent, ex parte review, the review department concluded that the referee's recommendation of disbarment was too severe. Although this was the third disciplinary proceeding against respondent since 1987, in light of the purposes of attorney discipline, the nature and extent of respondent's misconduct in the present proceeding, the chronology of respondent's prior discipline proceedings, and comparable Supreme Court precedent, the review department concluded that a three-year stayed suspension, three years probation, and one year of actual suspension constituted sufficient discipline.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance (default)

HEADNOTES

[1] **107 Procedure—Default/Relief from Default**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
Although respondent's default precluded respondent from seeking review and the State Bar examiner did not request review, the review department had a duty to review on an ex parte basis a proceeding heard by a referee of the former volunteer State Bar Court, as part of the transition to the new State Bar Court system. (Trans. Rules Proc. of State Bar, rules 109, 452(a).)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Respondent's failure to complete the services he undertook for his client and his de facto withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his client were wilful, and violated applicable Rules of Professional Conduct.

[3 a, b] **221.00 State Bar Act—Section 6106**
Respondent's repeated misrepresentations to his client's husband were reprehensible conduct for an attorney and constituted dishonesty and moral turpitude.

[4] **801.30 Standards—Effect as Guidelines**
Although the Supreme Court has commended the use of the Standards for Attorney Sanctions for Professional Conduct to the State Bar Court, the standards are guidelines. It is thus inconsistent with the purpose of the standards to urge that they mandate a particular result.

[5] **511 Aggravation—Prior Record—Found**
The Supreme Court has long considered an attorney's prior record of discipline to be an aggravating circumstance.

[6] **801.90 Standards—General Issues**
802.30 Standards—Purposes of Sanctions
806.59 Standards—Disbarment After Two Priors
Standard 1.7(b) of the Standards for Attorney Sanctions for Professional Misconduct, which provides for disbarment of a respondent who has a record of two prior impositions of discipline, cannot be applied without regard to the other provisions of the standards, particularly standard 1.3, which describes the primary purpose of the standards as the protection of the public, the courts and the legal profession; the maintenance of high professional standards and the preservation of public confidence in the profession.

[7] **513.10 Aggravation—Prior Record—Found but Discounted**
801.41 Standards—Deviation From—Justified
806.59 Standards—Disbarment After Two Priors
1092 Substantive Issues re Discipline—Excessiveness
In order to properly fulfill the purposes of lawyer discipline, the review department must examine the nature and chronology of a respondent's record of discipline. Mere fact that attorney has three impositions of discipline, without further analysis, may not justify disbarment.

[8] **513.10 Aggravation—Prior Record—Found but Discounted**
Where misconduct in current proceeding occurred prior to imposition of discipline in prior proceeding, record of prior discipline does not carry with it as full a need for severity as if misconduct had occurred after respondent had been disciplined and had failed to heed the import of that discipline.

[9] **801.41 Standards—Deviation From—Justified**
806.59 Standards—Disbarment After Two Priors
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness
Where no Supreme Court precedent would have justified disbarment for respondent's failure to perform services in two matters if both matters had been decided together, additional prior discipline for failure to pass Professional Responsibility Examination did not sufficiently add to severity of misconduct to justify imposing disbarment.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

Discipline

1013.09 Stayed Suspension—3 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

On our own motion, we review a recommendation of a referee of the former, volunteer State Bar Court, that William S. Miller, III ("respondent") be disbarred from the practice of law in this state.

Respondent was admitted to practice law in California in 1962.[1] This is his third disciplinary proceeding. As we shall discuss in more detail, respondent was publicly reproved in 1987 for wilfully failing in 1982 to complete services for a personal injury client. (Exh. 14.) Effective April 20, 1990, the Supreme Court suspended him for two years, stayed on conditions including sixty days actual suspension or until he passes the Professional Responsibility Examination, whichever is greater, for failure to timely pass that examination ordered in 1987 as part of his reproval. (Supreme Court S012452; see also exh. 15.) We review this third matter on a record showing that respondent performed some initial, minimal legal services for his client in a personal injury case, deceived her as to the status of the matter and then abandoned her. He also failed to participate in the State Bar investigation.

In this proceeding, respondent's default was entered after his failure to answer the formal charges, served on him by certified mail to his current address of State Bar record. (Bus. & Prof. Code, §§ 6002.1, 6088; rules 552 et seq., Trans. Rules Proc. of State Bar; exhs. 1, 3 and 4.)

[1] Although the respondent's default precluded his seeking our review and the State Bar examiner ("examiner") did not request our review, we nevertheless independently reviewed the record of this proceeding ex parte as is our duty to do as part of the transition to the new State Bar Court system. (Trans. Rules Proc. of State Bar, rules 109, 452(a).) Upon that ex parte review, we notified the examiner that we would set the matter for hearing on the question of whether the referee's disbarment recommendation was excessive.[2]

As we shall discuss below, upon careful consideration of the examiner's brief, oral argument and decisions of the Supreme Court we deem persuasive authority in this matter, we have concluded that the referee's disbarment recommendation is indeed excessive. We shall recommend, instead, that respondent be suspended for three years, concurrent to the probation imposed on him earlier this year in S012452 on conditions we shall set forth below including actual suspension for one year, consecutive to the suspension imposed in that recent order. We shall also recommend that if respondent is actually suspended for more than two years under our recommendation, that he be directed to comply with the requirements of standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct ("standards") (showing of fitness to practice before being allowed to end his suspension).

1. FACTS OF THE MATTER UNDER REVIEW.

In June of 1984, Ms. Jean R. Terry was injured and her automobile damaged when it struck the rear of a hay baling machine driven by another. The accident occurred on U.S. 95 near Blythe, California before dawn. The investigating highway patrol officer recommended that Terry be cited for violation of Vehicle Code section 21750 (failing to pass safely to the left of vehicle she was overtaking). (Exh. 10.)

In August of 1984, Terry hired respondent to represent her in seeking damages against the other driver. She paid respondent $150 as a "retainer." His fee was to be 25 percent of any recovery. (Exhs. 8, 9.)

On September 5, 1984, respondent wrote to the driver of the hay baler advising that he had been retained by Terry to press a claim for her personal

1. The notice to show cause admission date of 1982 is wrong and was corrected at the hearing. (R.T. pp. 6-7.)

2. We invited the State Bar examiner, the only party entitled to appear before us, to address the issue "Whether the hearing referee's recommendation of disbarment is excessive, particularly in view of decisions of the Supreme Court? (See, e.g., *Gold* v. *State Bar* (1989) 49 Cal.3d 908; *Blair* v. *State Bar* (1989) 49 Cal.3d 762; *Segal* v. *State Bar* (1988) 44 Cal.3d 1077.)"

injuries and recommended that the driver contact his insurer. (Exh. 10.)[3]

In November of 1984, Terry and her husband met with respondent at his offices. He told them he was working on Terry's case and would contact them as soon as the case was settled. (Exhs. 8, 9.)

On December 27, 1984, respondent's secretary sent the other driver's insurer Terry's authorization to release medical information. (Exh. 10.)

The State Bar introduced in evidence the entire file of the insurance company in the Terry matter. That file shows that respondent communicated no further with the insurer after sending his December 27 letter. (Exh. 10.) A State Bar investigative assistant checked court records in the appropriate Superior and Municipal Courts and found no suit filed on behalf of Terry. (Exhs. 11, 12.) This comports with what the insurance company file showed, for the insurer closed its file on September 27, 1985, noting that the statute of limitations on bodily injury had run with "nothing from [respondent] since Dec. 27 letter." (Exh. 10.)

Despite doing nothing further on the case, respondent did misrepresent its status to Terry's husband on four occasions during 1985 and 1986. Respondent told Terry that the insurance company had agreed to settle out of court; that the check was sitting on the insurer's vice president's desk waiting for signature, that the insurer had lost the check and finally, that the insurer had misplaced the entire file and respondent "could not do anything in [the] case." (Exh. 8.) Terry and her husband had each experienced difficulty in contacting respondent in 1984. After 1986, the Terrys were unable to contact him further despite many phone calls and messages left on his answering machine. (Exhs. 8, 9.)

Respondent also failed to respond to two letters sent him in summer 1988 by a State Bar investigator. Neither letter was returned by the postal service. Each of these letters directed respondent's attention to Business and Professions Code section 6068 (i) (duty to cooperate and participate in State Bar investigation). (Exh. 13.)

The hearing referee recited the facts generally as set forth above, but did not make specific findings related to his conclusions that respondent violated the following sections[4] of the State Bar Act: 6068 (a), 6068 (i), 6103 and 6106 and the following (former) Rules of Professional Conduct: 2-111(A)(2) and 6-101(A)(2).[5] (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968.)

[2] From the above facts, we conclude that respondent's failure to complete the services he undertook for Terry and his de facto withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his client was wilful and violated rules 2-111(A)(2) and 6-101(A)(2). (See *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.) **[3a]** We also conclude that respondent's misrepresentations to Terry's husband in 1985 and 1986 constituted dishonesty and moral turpitude and thus violated section 6106. Respondent's failure to participate in the State Bar investigation violated section 6068 (i). On the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815, we decline to conclude that respondent wilfully violated sections 6068 (a) or 6103 as found below.

2. RESPONDENT'S PRIOR RECORD OF DISCIPLINE.

As noted *ante*, although respondent has been admitted to practice for 28 years, in recent years he has been disciplined twice. In 1987 he was publicly

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3. Liability was questionable since the other driver maintained that his hay baler had adequate rear lights which were working when rear-ended by Terry; and, as noted, the highway patrol officer recommended citing Terry. (Exh. 10.)

4. Unless noted otherwise, all references to "sections" are to the provisions of the State Bar Act. (Bus. & Prof. Code, §§ 6000 et seq.)

5. Unless noted otherwise, all references to "rules" are to the former Rules of Professional Conduct in effect up to May 27, 1989.

reproved and ordered to pass the Professional Responsibility Examination within one year. The stipulated facts upon which that reproval rested show that in one matter in 1982, respondent wilfully failed to complete services in a personal injury case, resulting in the client's cause of action being time-barred. The stipulation stated that there was not sufficient evidence that respondent wilfully misrepresented the status of the matter to his client; and the parties stipulated to mitigating circumstances: respondent's lack of a prior disciplinary record, his cooperation with the State Bar and his offer to prove that a law office move and a departing secretary caused chaos in his office resulting in the misconduct. Respondent stated that he since improved office procedures. (Exh. 14.)

Respondent's suspension earlier this year for failure to timely pass the Professional Responsibility Examination rested on findings showing that respondent received communications from the State Bar advising him of the requirement to take that examination and he readily admitted his failure to take it. In mitigation, the findings showed that respondent was cooperative with the State Bar, candid and remorseful. He was a busy practitioner and one of only two attorneys in the sparsely populated geographical area he serves and that the illness of his father during the time diverted respondent's attention from other important matters. (Exh. 15.)

3. THE APPROPRIATE DEGREE OF DISCIPLINE TO NOW RECOMMEND.

The only issue before us is that of the appropriate degree of discipline to recommend.

In urging that we follow the hearing referee's decision recommending disbarment, the examiner's central point is that "Standard 1.7 Mandates Disbarment." We reject that argument. **[4]** Although our Supreme Court has commended to us the standards (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11, 268), they are *guidelines*. (E.g., *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 198, fn. 14.) It is thus inconsistent with their purpose to urge that these guidelines "mandate" a particular result. Moreover, the examiner's brief is devoid of any citation of Supreme Court authority in support of the referee's disbarment recommendation. Instead, the examiner's only citations of Supreme Court decisions are in an attempt to distinguish the cases we cited when directing a hearing on the ground that it appeared that disbarment is too severe a discipline in this matter.

Since the examiner has urged disbarment based primarily on standard 1.7(b), we examine that standard as it applies here. **[5]** The Supreme Court has long considered an attorney's prior record of discipline to be an aggravating circumstance. (*Sevin* v. *State Bar* (1973) 8 Cal.3d 641, 646; *Marsh* v. *State Bar* (1934) 2 Cal.2d 75, 78-80.) **[6]** Standard 1.7(b) provides, "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline . . ., the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." However, standard 1.7 cannot be applied without regard to the other provisions of the standards, particularly standard 1.3 which describes the primary purposes of the standards as "protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession". **[7]** To properly fulfill these purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline. (Compare, e.g., *McCray* v. *State Bar* (1985) 38 Cal.3d 257, 274.) Merely declaring that an attorney has three impositions of discipline, without more analysis, may not adequately justify disbarment in every case.

Respondent's first disciplinary misconduct arose in 1982 after 20 years of discipline-free practice. It resulted in a public reproval in 1987. **[8]** This discipline was imposed after respondent's misconduct in the current, *Terry*, matter. While the first matter was indeed the imposition of prior discipline (cf. *Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715), it does not carry with it as full a need for severity as if the misconduct in the *Terry* matter had occurred after respondent had been disciplined and had failed to heed the import of that discipline. **[9]** If respondent's first prior and the present *Terry* matter were to have been decided together, no Supreme Court case could have been

cited to justify the recommendation of disbarment for the failure to perform services in two matters, coupled with deceit and failure to participate in the *Terry* matter. Respondent's intervening discipline for failure to timely pass the Professional Responsibility Examination, while inexcusable, does not sufficiently add to the severity to justify imposing disbarment.

Our conclusion is fortified by the Supreme Court's recent decision in *Arm* v. *State Bar* (1990) 50 Cal.3d 763. In that matter, a majority of the Court declined to disbar the attorney who had been found culpable in a fourth disciplinary proceeding. We find a number of similarities between *Arm* and this matter. In both, the individual matters did not warrant severe discipline and there was not a pattern or common thread to all the matters of discipline.

That we consider disbarment too severe here neither excuses respondent's acts nor signals that attorneys found culpable of repeated misconduct can escape appropriate discipline for their acts. Indeed, we are deeply concerned that, after two decades of discipline-free practice, respondent has engaged in misconduct in recent years which appears to be getting more serious. In this most recent matter, it was joined by his failure to participate either in the State Bar investigation or in these formal proceedings. **[3b]** Moreover, his misconduct in the present, *Terry* matter included repeated acts of deceit to Terry's husband—conduct which is reprehensible for an attorney. (*Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567; *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1146-1147.)

We believe that cases like *Blair* v. *State Bar* (1989) 49 Cal.3d 762 and *Carter* v. *State Bar* (1988) 44 Cal.3d 1091 serve as better guides from the Supreme Court bearing on this matter than would be achieved by following literally standard 1.7(b). In the *Blair* case, the attorney had three prior suspensions for misappropriation of trust funds imposed between 1979 and 1981. He had also been suspended for almost a year during that period for failure to pass the Professional Responsibility Examination. In his fourth disciplinary proceeding which the Supreme Court reviewed, Blair was found culpable in three separate client matters in which he had acted dilatorily and had failed to perform legal services competently. In *Blair*, the attorney participated and urged mitigating circumstances. Even with his serious prior record of discipline, the Supreme Court did not disbar, but suspended him for five years, stayed on conditions including a two-year actual suspension.

In *Carter*, the attorney was admitted to practice in 1956. He had one prior public reproval in 1986 for two matters of misconduct in which he wilfully failed to inform the client of the status of the case or to use the requisite skill in handling the cases. In his second disciplinary case reviewed by the high Court, Carter was found to have committed several types of misconduct in handling two different matters for a client, including abandonment and misrepresentations of fact. The Court concluded that no mitigating circumstances existed and suspended Carter for two years, stayed on conditions including six months actual suspension.

Considering that respondent's prior record is less severe than *Blair* but more severe than *Carter*, coupled with his failure to appear in these proceedings, we conclude that the appropriate discipline here is a three-year suspension, stayed, concurrent to his pending stayed suspension, on conditions including actual suspension for the first year, consecutive to his recently-imposed actual suspension. We also recommend that he be required to perform the other duties specified in the following recommendation.

4. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, William S. Miller III, be suspended from the practice of law in the State of California for a period of three (3) years, concurrent to the suspension ordered in S012452; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for a period of three (3) years concurrent to that previous suspension, upon the following conditions:

1. Respondent shall be actually suspended for the first year of probation, consecutive to the actual suspension served in S012452;

2. If respondent is actually suspended for an uninterrupted period of two years or greater as a

result of condition 1 above (including the actual suspension served in S012452), he shall be required to show proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, in order to terminate his actual suspension; and

3. During the period of this probation, respondent shall comply with the other conditions of probation ordered by the Supreme Court in S012452.

We further recommend that the Supreme Court direct respondent to comply with the provisions of rule 955, California Rules of Court, that the respondent comply with the provisions of paragraph (a) of said rule within 30 days of the effective date of the Supreme Court order herein and to file the affidavit with the Clerk of the Supreme Court provided for in paragraph (c) of the rule within 40 days of the effective date of the order showing his compliance with said order.

We concur:

PEARLMAN, P.J.
NORIAN, J.